

**ATTACHMENT 5.**

**Agreement No. 2004-120-COS**

**Please Note:**

This document is referred to in **ATTACHMENT 2** (Resolution No. 6512) of this packet as Exhibit A .

## Attachment 5

### EXHIBIT A

City of Scottsdale Agreement No. 2004-120-COS

When recorded, return to:  
William A. Hicks III, Esq.  
SNELL & WILMER L.L.P.  
One Arizona Center  
Phoenix, AZ 85004-2202

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### AGREEMENT

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between

CITY OF SCOTTSDALE MUNICIPAL PROPERTY CORPORATION

and

CITY OF SCOTTSDALE, ARIZONA

Relating to  
Not to Exceed \$42,000,000  
City of Scottsdale Municipal Property Corporation  
Excise Tax Revenue Bonds  
Series 2004A

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DATED AS OF \_\_\_\_\_, 2004

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## AGREEMENT

THIS AGREEMENT, made and entered into as of \_\_\_\_\_, 2004, by and between CITY OF SCOTTSDALE MUNICIPAL PROPERTY CORPORATION, an Arizona nonprofit corporation (the "MPC") and the CITY OF SCOTTSDALE, ARIZONA, an Arizona municipal corporation (the "City"),

### WITNESSETH:

WHEREAS, the City desires to facilitate the development of the ASU Scottsdale Center for New Technology and Innovation (the "Center") in the City by an affiliate of the Arizona State University Foundation (the "Foundation") in order to assist in the economic development, and the creation of approximately 4,000 new jobs, in that part of the City; and

WHEREAS, in support of the Center, the City wishes to acquire the real property on which the Center will be developed, as more fully described on Exhibit A hereto (the "Property"), for lease to the Foundation; and

WHEREAS, the MPC was created for the express purpose of aiding and assisting the City in financing or refinancing municipal facilities and property at no profit to itself or to any other person except the City, and the MPC is willing to assist the City in accomplishing the objectives stated above in the manner hereinafter set forth; and

WHEREAS, the MPC has agreed to acquire the Property on behalf of the City and to sell and transfer the Property to the City pursuant to this Agreement for lease to the Foundation; and

WHEREAS, the City will advance on behalf of the MPC cash in an amount sufficient to enable the MPC to acquire the Property, subject to reimbursement from the proceeds of the MPC's Bonds (as hereinafter defined); and

WHEREAS, the MPC has agreed to issue and sell its excise tax revenue bonds (the "Bonds") in an aggregate original principal amount not to exceed \$42,000,000 pursuant to an Trust Indenture, to be dated on or about September 1, 2004 (the "Indenture"), between the MPC and Wells Fargo Bank, N.A., a national banking association, as trustee (the "Trustee"), to finance the purchase of the Property and to reimburse the City for the cash advanced on its behalf; and

WHEREAS, in consideration of the MPC's acquisition of the Property and the sale and transfer of the Property to the City pursuant to this Agreement, the City has agreed to pay to the MPC from time to time such amounts at such times as may be required to pay debt service on the Bonds and has agreed to pledge its Excise Taxes (as hereinafter defined) as security and the sole source for payment of such obligation;

NOW, THEREFORE, in consideration of the mutual covenants, conditions and agreements hereinafter contained, IT IS HEREBY AGREED as follows:

## **ARTICLE I ACQUISITION OF PROPERTY**

**Section 1.1 Acquisition of Property.** The MPC hereby agrees to acquire the Property on behalf of the City.

**Section 1.2 Means of Financing.** As a means of financing the acquisition of the Property, the MPC will issue its Excise Tax Revenue Bonds, Series 2004A, in an aggregate original principal amount not to exceed \$42,000,000 (the "Bonds"), pursuant to the Indenture and will apply the proceeds thereof to reimburse the City for the City's advance to the MPC of cash in an amount sufficient to enable the MPC to acquire the Property for sale to the City.

**Section 1.3 Transfer to the City.** The MPC hereby sells, assigns, transfers and conveys to the City all of its right, title and interest in and to the Property in accordance with the provisions hereof.

**Section 1.4 Term.** This Agreement will terminate concurrently with the City's payment or prepayment of all amounts due pursuant to Sections 2.2, 2.4 and 2.5 hereof; provided, however, that such termination shall not relieve any party of any obligation or duty arising, or liability for any amount due and payable, pursuant to the terms hereof prior to such termination.

**Section 1.5 Title to and Encumbrance of Interests.** For all purposes hereof, the Property shall be the property of the City. During the Term, the MPC shall not have any right or authority to cause or permit any lien, claim, charge or encumbrance of any nature or description whatsoever to attach to or encumber the Property or any part thereof; provided, however, that the City acknowledges and consents to the MPC's pledge and assignment to the Trustee of its right, title and interest in and to this Agreement and the City's payments pursuant to this Agreement as security for the Bonds to be issued pursuant to the Indenture. Notwithstanding the foregoing, such pledge and assignment shall in no event be construed or deemed to convey to the Trustee any fee title, leasehold or beneficial interest or other rights in or to the Property.

**Section 1.6 Surrender.** Upon the expiration or termination of the Term hereof, the MPC shall thereupon take any additional action and execute and deliver to the City any additional instruments or agreements necessary to confirm the City's right, title and interest in and to the Property free and clear of all liens and encumbrances except (i) conditions, reservations, exceptions, rights-of-way and easements of record on the date hereof or (ii) liens or encumbrances attaching to the Property as a result of action or inaction on the part of the City.

**Section 1.7 Environmental Matters.** To the extent permitted by law, the City hereby agrees to indemnify and hold the MPC and the Trustee, their respective successors and assigns, harmless for, from and against any and all liabilities, obligations, losses, damages, fines, penalties, claims, actions, suits, costs and expenses, including reasonable attorneys' fees and expenses, imposed on, incurred by or levied against the MPC or the Trustee, or the successors and assigns of the MPC or the Trustee, as the case may be, in any way relating to or arising from the City's, or any predecessors' in interest, use, generation, transportation, maintenance, discharge, release, removal, storage or disposal of any Regulated Substances (as defined herein) in, on, under or from the real property, including without limitation, those arising from any violations of applicable Federal, state or local environmental laws, rules, regulations or ordinances, or from damages to any property or death or injury to any person.

For the purposes hereof, the term "Regulated Substances" refers to any pollutants, contaminants, residues, wastes or other substances subject to or defined as regulated or hazardous substances in applicable Federal, state or local environmental laws, rules, regulations or ordinances.

This Section 1.7 shall survive the resignation or removal of the Trustee pursuant to the Indenture, and the discharge or termination of this Agreement and/or the Indenture.

## **ARTICLE II ACQUISITION BY CITY**

**Section 2.1 Acquisition of Property.** The City hereby agrees to purchase the Property (the "Acquisition") by payment of the amounts specified in Section 2.2 hereof.

**Section 2.2 Installment Payments.** The City hereby agrees to pay to or at the direction of the MPC from time to time installments of such amounts at such times as may be necessary to permit the MPC to make timely payment of debt service on the Bonds, and the periodic fees and expenses of the Trustee, Bond Registrar and Paying Agent. It is understood and agreed by the parties hereto that, unless otherwise directed by the MPC, the City's payments in accordance with this section shall be paid directly to the Trustee, for and on behalf of the MPC, at least one business day in advance of the date on which the related payment is to be made to the owners of the Bonds. It is further declared to be the intention of the parties that the City's obligation for installment payments shall be coextensive with the MPC's debt service and Trustee, Bond Registrar and Paying Agent obligations, and that, when the Bonds, the Trustee's, Bond Registrar's and Paying Agent's fees and expenses, and all other amounts due pursuant to Sections 2.4 and 2.5 hereof have been fully paid or provided for, the City shall have no further obligation to make installment payments with respect to the Acquisition.

**Section 2.3 Assignment of Installment Payments.** All installment payments and all other payments to be made by the City pursuant to this Agreement, except as otherwise provided herein, shall be paid at the principal corporate trust office of the Trustee, in Phoenix, Arizona, or at such place or to such agent as the MPC may from time to time direct. The MPC shall cause the Trustee to apply the payments made by the City in the manner and for the purposes expressed in the Indenture.

**Section 2.4 Additional Installment Payments.** If the payments set forth in Section 2.2 are insufficient to meet the MPC's requirements pursuant to the Indenture, then, upon notice from either the MPC or the Trustee, the City shall pay pursuant hereto such other amounts as may be required from time to time to cure any such deficiency.

**Section 2.5 Other Costs and Expenses.** The City shall pay (i) all fees, expenses (including closing fees and expenses) and indemnities of the Trustee, Bond Registrar and Paying Agent pursuant to the Indenture to the extent, if any, that such fees, expenses and indemnities are not met by the scheduled installment payments, (ii) the necessary and reasonable expenses of the MPC approved by the City and not otherwise required to be paid by the City pursuant to the terms hereof, (iii) losses on investments made by the Trustee pursuant to the terms of the Indenture, but only to the extent necessary to meet the Bond requirements and to pay the Trustee's, Bond Registrar's and Paying Agent's fees and expenses in accordance with the Indenture, and (iv) fees for maintaining the MPC's corporate existence and other expenses of the MPC incurred at the written request of the City or the Trustee in



accordance with the provisions of this Agreement. The City shall pay the amounts specified in (i) directly to the Trustee, Bond Registrar or Paying Agent as they become due and within twenty (20) days after the receipt by the City of invoice therefor, in (ii) either to the MPC or its creditors, upon evidence that the expenses or fees have been incurred by it, and within twenty (20) days after receipt by the City of an invoice therefor, in (iii) to the Trustee, and in (iv) to the MPC, upon evidence that such expenses have been incurred.

**Section 2.6 Excess Money in Bond Fund.** Unless otherwise requested by the City pursuant to Section 15.3 hereof, any money in the Bond Fund created pursuant to the Indenture which, in the opinion of the Trustee, exceeds the amount necessary for the current debt service on the Bonds then outstanding (including administrative costs and expenses) shall, no less frequently than annually, so long as the City is not in default hereunder, constitute a credit to the City on the next succeeding installment payment or payments due or coming due pursuant to this Agreement.

**Section 2.7 Sources for Installment Payments.** The installment payments, as well as any other money required to be expended by the City pursuant to the provisions of this Agreement, shall be payable solely from sources referred to in Article IV below, and shall under no circumstances constitute a general obligation of the City or be payable from the proceeds of ad valorem taxes.

### **ARTICLE III TAXES, UTILITIES AND OTHER CHARGES**

**Section 3.1 Net Return to the MPC.** The City agrees that the aggregate amount payable by the City for the Acquisition of the Property shall be an absolute net return to the MPC, free from any expenses and charges with respect to the Property or the income therefrom, except that any expenses described in clause (ii) of Section 2.5 hereof must first be approved by the City.

**Section 3.2 Payment of Governmental Charges by the City.** The City shall pay or cause to be paid, punctually, when due and payable, all real property and personal property taxes, income taxes, gross receipt taxes, business and occupation taxes, occupational license taxes, water charges, sewer charges, assessments (including but not limited to, assessments for public improvements or benefits), and all governmental taxes and charges of every kind and nature which at any time prior to the completion of the Term shall be or become due and payable by the MPC or the City, and which shall be levied, assessed or imposed:

- (a) Upon or with respect to the MPC, or which shall be or become liens upon the Property, or any interest therein or pursuant to this Agreement; or
- (b) Upon this transaction or any document to which the MPC or the City is a party creating or transferring an interest or an estate in or to the Property.

The City shall furnish to the MPC promptly, upon request, proof of the payment of any such tax, assessment or other governmental charge which is payable by the City pursuant to this Section 3.2. It shall not be a breach of this Section 3.2 if the City fails to pay any such tax, charge or assessment during any period or periods in which the City or the MPC, in good faith, is contesting the amount or validity of such tax, charge or assessment. The MPC will, if requested by the City, contest the amount or validity of any such tax, charge or assessment, and the City will pay the MPC's costs and expenses in connection therewith.

**Section 3.3 Payment of Utility Charges by the City.** The City shall pay or cause to be paid all charges for gas, water, steam, electricity, light, heat, power, telephone or other utility service furnished to or used in connection with the Property from and after the date hereof. The MPC shall not be required to furnish to the City or any other occupant any gas, water, sewer, electricity, light, heat, power, telephone or other utility service of any kind, nor shall the MPC be required to pay for such charges or services.

#### **ARTICLE IV SOURCES OF PAYMENTS AND PLEDGE**

**Section 4.1 Limited Sources for Installment Payments.** It is understood and agreed by and between the MPC and the City that all payments to be made by the City pursuant to this Agreement shall be made from Excise Taxes, as defined in Section 4.7 below, subject to the provisions of Section 4.2 hereof.

**Section 4.2 Other Sources at Option of the City.** The City may, at the City's sole option, make such payments from its other funds as may be permitted by law and as the City shall determine from time to time, but the MPC acknowledges that it has no claim hereunder to such other funds. Notwithstanding any other provision hereof, no part of the installment payments payable pursuant hereto shall be payable out of any *ad valorem* taxes imposed by the City or from bonds or other obligations for the payment of which the City's general taxing authority is pledged, unless (i) the same shall have been duly budgeted by the City according to law, (ii) such payment or payments shall be within the budget limitations set forth in the statutes of the State of Arizona, and (iii) any such bonded indebtedness or other obligation is within the debt limitations of the Constitution of the State of Arizona.

**Section 4.3 Pledge of Revenues and Excise Taxes.** The City does hereby pledge for the payment of the amounts payable pursuant to this Agreement its Excise Taxes, as defined in Section 4.7 below. The City intends that this pledge shall be a first lien upon such amounts of said revenues and taxes on parity with the pledge and lien of said revenues and taxes with respect to the MPC's prior bonds described in Section 17.3 below, as will be sufficient to make the payments pursuant hereto, and the City agrees and covenants to make said payments from such revenues and tax receipts, except to the extent that it chooses to make the payments from other sources as permitted by Section 4.2 hereof.

**Section 4.4 City to Maintain Coverage of Three Times Debt Service.** The City covenants and agrees that the Excise Taxes which it presently imposes will be retained and maintained so that the amount of Excise Taxes, all within and for the next preceding fiscal year, shall be equal to at least three (3) times the total of principal and interest payable with respect to the Bonds and the MPC's prior bonds described in Section 17.3 below and any additional parity obligations issued in the future in accordance with Section 4.6, to the extent outstanding in any current fiscal year. The City further covenants and agrees that if such receipts for any such preceding fiscal year shall not equal three (3) times such principal and interest requirements of any current fiscal year, or if at any time it appears that the current receipts will not be sufficient to meet such payment requirements, it will either impose additional Excise Taxes, or will increase the rates of such taxes currently imposed, in order that (i) the current receipts will be sufficient to meet all such current requirements; and (ii) the current year's receipts will be reasonably calculated to attain the level as required above for the succeeding fiscal year's principal and interest requirements.

**Section 4.5 Enforcement by Trustee.** In the event of any default by the City hereunder, the remedies of the MPC with respect to the enforcement of the lien and pledge set forth in this Article IV and with respect to the covenants and agreements contained in Section 4.4 above shall be as provided in Article XII of this Agreement. The Trustee, on behalf of the holders of the Bonds, may enforce this lien and pledge and the aforesaid covenants and agreements in place of the MPC in accordance with the terms and conditions of the Indenture.

**Section 4.6 Further Encumbrance of Taxes; Parity Obligations.** The City, for itself, its successors and assigns, covenants and agrees with the holders of the Bonds that, so long as any of said Bonds remain outstanding and the principal and interest thereon shall be unpaid or unprovided for, it will not further encumber the Excise Taxes pledged pursuant to this Article on a basis equal to this pledge unless the taxes collected in the next preceding fiscal year shall have amounted to at least three (3) times the highest combined interest and principal requirements for any succeeding twelve (12) month period for all Bonds and parity obligations then outstanding and any parity bonds or other parity obligations so proposed to be secured by a pledge of these taxes. Subject to the foregoing, and to other terms and conditions set forth herein and in the Indenture, the City shall have the right to incur future obligations payable from and secured by the Excise Taxes on a parity with the payments due pursuant to this Agreement.

**Section 4.7 Definition of Excise Taxes.** "Excise Taxes" means all excise taxes now or hereafter validly imposed by the City and the proceeds of all excise taxes imposed by other entities and contributed, allocated or paid over to the City and not earmarked by the contributor for a contrary or inconsistent purpose. "Excise Taxes" includes, without limitation, excise, transaction privilege, franchise, sales and use taxes, state-shared sales and income taxes, fees for licenses and permits and state revenue-sharing.

## **ARTICLE V MAINTENANCE AND ALTERATIONS**

**Section 5.1 City to Maintain the Property.** From and after the date hereof, all maintenance and repair of the Property shall be the responsibility of the City, and the City covenants and agrees that it will maintain the Property or cause the same to be maintained in at least as good condition as when the City takes possession, ordinary wear and tear excepted.

**Section 5.2 Alterations By the City.** The City shall have the right during the term of this Agreement to make any alterations to, lease or develop the Property if the same are deemed by the City to be necessary or beneficial; provided, however, that any such alterations shall maintain the integrity of the property and shall not decrease the value thereof.

## **ARTICLE VI INSURANCE**

**Section 6.1 General Liability Insurance.** The City shall purchase and maintain, or cause to be purchased and maintained, in full force and effect a self insurance program or commercial general liability insurance policy with limits appropriate for the nature of the property and the activities conducted there which shall include coverage for bodily injury and property damage, occurring on, in, around or by use of the Property. The City's self insurance program or commercial general liability policy, as the case may be, shall afford protection to the MPC, its directors, officers, agents and employees by naming the MPC as an additional insured. The City shall furnish evidence of such insurance to the Trustee.

**Section 6.2 Additional Insurance.** The City's obligations pursuant to this Article shall not affect its right to carry additional insurance solely for its own account. Any insurance required by this Article VI may be carried in conjunction with any other insurance carried by the City, and may be provided by self-insurance by the City. Any claims arising pursuant to the policies of insurance described by this Article shall be adjusted by and at the cost of the City, provided that the proceeds from such insurance shall be applied pursuant to the terms of this Agreement.

## **ARTICLE VII OFFICIAL STATEMENT DISCLOSURES; INDEMNIFICATION**

**Section 7.1 City's Representations in Official Statement.** The City hereby recognizes that, in the sale of the Bonds, the MPC will issue an Official Statement describing the Bonds and the security for the payment thereof and containing certain information about the City which has been furnished to the MPC by the City. Recognizing that the MPC and its officers, directors, agents and employees have no practicable independent means of verifying such information, the City hereby represents and warrants to the MPC that all material contained in the MPC's Official Statement with respect to the Bonds insofar as it relates to the City and the sources of funds or as it otherwise describes the security of this Agreement and the rights of the bondholders with respect thereto, will be accurate, contain no material misrepresentation of fact and will not omit any statement of fact which, in the light of the circumstances pursuant to which said Official Statement is issued, would be misleading.

**Section 7.2 Indemnity as to Use of Property.** The City covenants and agrees, at its expense, and to the extent permitted by law, to pay and to indemnify and save the MPC harmless against and from any and all claims by or on behalf of any person, firm, corporation or governmental authority arising from its ownership, occupation, use, or possession of the Property, including any liability for any violation of conditions, restrictions, laws, ordinances or regulations affecting the Property or the occupancy or use thereof.

**Section 7.3 General Indemnification.** The MPC, its directors, officers, agents and employees shall not be liable to the City or to any other person whomsoever for any death, injury or damage that may result to any person or property by or from any cause whatsoever on the Property or any part thereof, unless caused by the willful misconduct of the MPC, its directors, officers, agents, or employees. To the extent permitted by law, the City shall indemnify and hold such persons harmless from and defend them and each of them against any and all claims, losses or judgments for death of, or injury to, any person, or for damage to any property whatsoever incurred in or on the adjoining streets, sidewalks and passageways, unless caused by the willful misconduct of the MPC, its directors, officers, agents or employees. In the event any action or proceeding is brought against any of the persons referred to in this Section by reason of any such claim, the City, upon notice from the MPC, shall resist or defend such action or proceeding.

**Section 7.4 Enforcement Expenses.** The City agrees to pay and indemnify the MPC and Trustee for, from and against all lawful and reasonable costs and charges, including reasonable counsel fees, in enforcing any covenant or agreement of the City contained in this Agreement.

**Section 7.5 Further Indemnification.** In clarification and extension of the provisions of the other sections of this Article VII, and not in substitution therefor, the City, agrees to and does hereby indemnify and hold the MPC and the Trustee, their directors, officers, agents and

employees, harmless for, from and against any and all claims, expenses, liens, judgments, liability or loss whatever, including reasonable legal fees and expenses relating to or in any way arising out of (i) this Agreement, the Indenture, security agreements, financing statements, supplements, amendments or additions thereto or the enforcement of any of the terms thereof; (ii) the Bonds; (iii) any official statement, either preliminary or final, pertaining to the Bonds; (iv) the issuance and sale of the Bonds or the transactions contemplated in any of the aforementioned acts, agreements or documents; and (v) malfeasance or nonfeasance in office of any officer, director, agent or employee of the MPC or the Trustee not otherwise included within any of the foregoing; provided, however, that such indemnity shall not extend to any actions of the MPC or the Trustee deliberately or willfully taken by it over the objections of the City. The MPC or the Trustee, as applicable, shall give notice to the City of any event or condition which requires indemnification by the City hereunder, or any allegation of such event or condition, promptly upon obtaining knowledge thereof, and, to the extent that the City makes or provides for payment to the satisfaction of the MPC or the Trustee pursuant to the indemnity provisions hereof, the City shall be subrogated to the rights of the MPC or the Trustee with respect to such event or condition and shall have the right to determine the settlement of claims thereon, it being agreed that, except to the foregoing extent, the MPC or the Trustee shall have the right to determine such settlement. The City shall pay all amounts due hereunder promptly upon notice thereof from the MPC or the Trustee. In case any action, suit or proceeding is brought against the MPC or the Trustee by reason of any act or condition which requires indemnification by the City hereunder, the MPC or the Trustee shall notify the City promptly of such action, suit or proceeding, and the City may (and will upon the request of the MPC or Trustee), at the City's expense, resist and defend such action, suit or proceeding, or cause the same to be resisted and defended, by counsel for the insurer of the liability or by counsel designated by the City and approved by the MPC or the Trustee. If the MPC or the Trustee desires to participate in the defense of such action, suit or proceeding through its own counsel, it may do so at its own expense.

**Section 7.6 Survival.** The terms of this Article VII shall survive the resignation or removal of the Trustee pursuant to the Indenture or the discharge or termination of the Acquisition, this Agreement or the Indenture.

## **ARTICLE VIII CONDEMNATION**

**Section 8.1 Condemnation Proceeds to the City.** In the event of the taking or condemnation of the Property, in whole or in part, by any authority through the exercise of the power of eminent domain, or the sale of any portion of the Property pursuant to threat of condemnation, any award or payment therefor shall be paid to the City. The MPC hereby assigns all of its right, title and interest in and to such award to the City.

## **ARTICLE IX ASSIGNMENTS, LEASING AND MORTGAGING**

**Section 9.1 Restrictions on the City.** The City may sublease or rent the Property, or any portion thereof, without the consent of the MPC; provided, however, that notwithstanding any such leasing or renting, the City shall nevertheless remain liable for the payments provided herein and for the performance of the other obligations of the City pursuant hereto.

**Section 9.2 Assignment to the Trustee.** All rights of the MPC to the City's payments pursuant to Section 2.2 are to be assigned and pledged to the Trustee as security for the

Bonds, but subject to the City's rights in accordance with this Agreement. The rights of the Trustee or any party or parties on behalf of whom the Trustee is acting shall not be subject to any defense, setoff, counterclaim or recoupment whatsoever, whether arising out of any breach of any obligation of the MPC hereunder, or by reason of any other indebtedness or liability at any time owing by the MPC to the City.

## **ARTICLE X DEFAULT BY THE CITY**

**Section 10.1 Remedies Upon Default.** Upon the nonpayment of the whole or any part of the aforesaid installment payments at the time when the same is to be paid as herein provided, or upon violation by the City of any other covenant or provision of this Agreement, and if such default has not been cured (i) in the case of nonpayment of installment payments, within five (5) days; and (ii) in the case of the breach of any other covenant or provision of this Agreement, within fifteen (15) days, after notice in writing from the MPC specifying such default, then the MPC may bring an action for the recovery of any of the installment payments due or accruing, or for damages for the breach of said Agreement.

**Section 10.2 Appointment of Receiver.** Upon bringing suit to collect any installment payment in default, the MPC may request foreclosure of the pledges and liens set forth in Article IV of this Agreement, in which event the MPC, as a matter of right, without notice and without giving bond to the City or anyone claiming in accordance with the City, may have a receiver appointed of all the Excise Taxes which are so pledged for the payment of the installment payments, with such powers as the court making such appointment shall confer, and the City does hereby irrevocably consent to such appointment.

**Section 10.3 Recovery of Costs and Attorneys' Fees.** In any such suit to enforce the terms of this Agreement, the MPC (and the Trustee, if a party) shall recover its costs therein, as well as reasonable attorneys' fees, as the court shall approve.

## **ARTICLE XI DEFAULT BY THE MPC**

**Section 11.1 Remedies of the City.** The MPC shall in no event be in default in the performance of any of its obligations hereunder unless and until the MPC shall have failed to perform such obligations within thirty (30) days, or such additional time as is reasonably required to correct any such default, after notice by the City to the MPC and to the Trustee properly specifying wherein the MPC has failed to perform any such obligation. The City agrees that, so long as any Bonds are outstanding, the City shall have no right to abate or offset the installment payments to be made by it hereunder as a result of a default by the MPC. In the event of default by the MPC, the MPC agrees that specific performance may be had and the City shall not be limited to a remedy for damages.

## **ARTICLE XII REMEDIES**

**Section 12.1 Accumulation of Remedies.** Each right, power and remedy of the MPC or the City provided for in this Agreement shall be cumulative and concurrent and shall be in addition to every other right, power or remedy provided for in this Agreement, or, unless prohibited by the terms hereof, now or hereafter existing at law or in equity or by statute or otherwise, to be enforced; and the exercise or beginning of the exercise by the MPC or the City

of any one or more of the rights, powers or remedies provided for in this Agreement shall not preclude the simultaneous or later exercise by the MPC or the City of any or all of such other rights, powers or remedies provided for in this Agreement.

**Section 12.2 Nonwaiver.** The failure to insist upon a strict performance of any of the covenants or agreements herein set forth shall not be considered or taken as a waiver or relinquishment for the future of the MPC's or the City's rights to insist upon a strict compliance by the City or the MPC with all the covenants and conditions hereof.

### **ARTICLE XIII ESTOPPEL CERTIFICATE**

**Section 13.1 Certificate by the City.** The City agrees at any time and from time to time, upon not less than ten (10) days' prior request by the MPC or Trustee, to execute, acknowledge and deliver to the MPC and Trustee a statement in writing certifying that this Agreement is unmodified and in full force and effect (or if the Agreement has been modified, that the Agreement is in full force and effect except as modified, and stating the modification), that the City is in compliance with its terms, and the dates to which the installment payments and additional amounts have been paid in advance, if any.

### **ARTICLE XIV NO ABATEMENT OF PAYMENTS**

**Section 14.1 Nonabatement until Bonds Paid.** Except as in this Agreement expressly provided, this Agreement shall not terminate or be affected in any manner by reason of the condemnation, destruction or damage, in whole or in part of, the Property, and except as in this Agreement expressly provided, the installment payments, as well as additional installment payments payable hereunder, shall be paid by the City in accordance with the terms, covenants and conditions of this Agreement without abatement, diminution or reduction.

### **ARTICLE XV REFINANCING; ADVANCE REFUNDING, REDEMPTION OR PURCHASE OF BONDS; ADDITIONAL BONDS**

**Section 15.1 Redemption or Advance Refunding.** Upon notice to the MPC, the City may request the MPC to refinance the indebtedness represented by the Bonds by advance refunding or redeeming the Bonds then outstanding, subject to the provisions of the Indenture, and issuing new bonds or other obligations. The MPC will use its best efforts to refinance such indebtedness in response to such request.

**Section 15.2 Supplemental Agreement.** Prior to the issuance of any such new bonds or other obligations for the purpose of refinancing its Bond indebtedness, the MPC and the City shall enter into a written supplement to this Agreement increasing or decreasing, as the case may be, the installment payments to be paid pursuant hereto by an amount at least sufficient to enable the MPC to pay in full the principal and interest, when due, on such new bonds or other obligations and all other usual and ordinary costs and expenses relating thereto, and such supplement to this Agreement shall be recorded in the office of the County Recorder of Maricopa County, Arizona.

**Section 15.3 Purchasing or Redeeming Bonds Prior to Maturity.** The City shall have the right to pay installment payments in advance and may specify that they be placed in

the Bond Fund created pursuant to the Indenture. At the City's request, the MPC shall cause the amount of money contained in the Bond Fund from time to time to be used on any redemption date authorized in the Indenture to retire all or any portion of said outstanding Bonds pursuant to the provisions of the Indenture; or if, before Bonds are callable, they may be obtained in the open market at a cost equal to or below par, or, after Bonds are callable, they may be so obtained at a price below the cost of redemption, then, upon the City's request, the MPC shall cause money contained in the Bond Fund to be used to purchase Bonds in the open market for the purpose of cancellation. At such time or times as Bonds are redeemed or purchased pursuant hereto, the installment payments to be paid by the City in accordance with Section 2.2 hereof shall be adjusted in such manner as to provide for the debt service on the remaining Bonds.

**Section 15.4 Release of Indenture.** Upon payment or provision for payment of all Bonds, by means of advance refunding, redemption and/or purchase pursuant to the provisions hereof, and upon payment of any remaining administrative costs and expenses or other amounts due hereunder or pursuant to the Indenture, the MPC shall cause the Trustee to release the lien of the Indenture on the City's Excise Taxes pursuant to this Agreement, and both this Agreement and the Indenture shall terminate.

**Section 15.5 Additional Bonds.** Subject to the provisions of Section 4.6 hereof, the MPC may establish one or more issues of additional bonds on a parity with the Bonds and may issue and deliver such additional bonds, in such principal amount as may be determined by the MPC, subject to the following specific conditions which are hereby made conditions precedent to the issuance of such additional bonds:

(a) such additional bonds shall have been authorized to aid the City in financing the construction of municipal facilities upon real property, or to lease or acquire other property and construct other facilities upon the request of the City for other governmental, civic and community purposes, or to assist the City in any other municipal financing, and the issuance thereof shall have been determined and declared by the MPC, by appropriate resolution, to be necessary for that purpose;

(b) the MPC shall be in compliance with all covenants and undertakings set forth in this Agreement and in the Indenture, as either or both may have been supplemented;

(c) the resolution authorizing issuance of such additional bonds shall require that the proceeds of the sale of such additional bonds shall be applied solely (i) for one or more of the purposes set forth in (a) above and expenses and costs incidental thereto, including costs and expenses incident to the issuance and sale of such additional bonds, (ii) if desired, a reasonable debt service reserve fund for the protection of the holders of the additional bonds, and (iii) interest on said additional bonds during the actual period of any construction of such facilities, and for an appropriate period thereafter;

(d) such additional bonds shall be equally and ratably secured with the Bonds herein authorized as to the pledge and lien of Excise Taxes in Article IV hereof, without preference or priority of any of the bonds over any other bonds, except as expressly provided in the Indenture, as supplemented;



(e) the MPC shall have entered into an agreement with the City, or shall have amended this Agreement, in and by which the City obligates itself in the manner therein provided to increase the installment payments to the MPC and to make such installment payments to the MPC at the times and in amounts sufficient to provide for the payment of principal and interest on such additional bonds as such principal and interest become due;

(f) the condition set forth in Section 4.6 hereof shall then be satisfied.

## **ARTICLE XVI REPRESENTATIONS AND WARRANTIES OF THE MPC**

**Section 16.1 No Amendments or Additional Indebtedness.** The MPC represents and warrants that it will not amend its Articles of Incorporation or enter into any indenture or supplemental indenture or issue any notes, certificates of indebtedness or bonds, other than those provided for in the Indenture or the Agreement, or incur any indebtedness other than for routine expenses, without first obtaining the written consent of the City.

**Section 16.2 Application of Payments.** All sums of money payable hereunder by the City to the MPC, except as herein expressly provided, shall be paid to Trustee so long as any indebtedness is outstanding and unpaid pursuant to the Indenture, and the MPC shall cause Trustee to apply such payments in accordance with the provisions of the Indenture.

## **ARTICLE XVII PREVIOUS AGREEMENTS, INDENTURES AND BONDS**

**Section 17.1 Previous Agreements.** The MPC and the City have entered into the following agreements, which agreements were duly recorded in the office of the County Recorder of Maricopa County, Arizona, on the dates and in the records hereafter set forth, to wit:

<u>Date of Agreement</u>	<u>Title</u>	<u>Date of Recording</u>	<u>Recorder's Docket No.</u>	<u>Page of Docket</u>
02-11-74	Second Supplemental Agreement	02-19-74	10,522	801
04-01-85	Agreement	04-29-85	85-191021	---
10-01-85	Agreement	11-07-85	85-531418	---
02-01-87	Agreement	03-11-87	87-146917	---
07-01-87	Agreement	07-27-87	87-474218	---
06-01-92	Lease and Refunding Agreement	06-25-92	92-0344843	---
04-01-93	Refunding Agreement	04-22-93	93-0240062	---
04-01-94	Supplement to Agreement	04-05-94	94-0273543	---
05-01-95	Agreement	05-16-95	95-0278652	---
11-01-95	Agreement	11-21-95	95-0716352	---
06-01-96	Agreement	07-16-96	96-0498818	---
11-01-98	Agreement	---	---	---
10-01-01	Amendments to Lease, Sublease, Service Agreements	05-30-02	2002-0553210	---
07-01-01	Amendment to Lease and Refunding Agreement	07-18-01	2001-0643673	---

05-01-04      Agreement

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**Section 17.2 Previous Indentures.** The MPC has previously entered into the following indentures, each of which was duly recorded in the office of the County Recorder of Maricopa County, Arizona, on the dates and in the records hereinafter set forth, to wit:

<u>Date of Agreement</u>	<u>Title</u>	<u>Date of Recording</u>	<u>Recorder's Docket No.</u>	<u>Page of Docket</u>
02-11-74	Second Supplemental Indenture	02-19-74	10,522	838
04-01-85	Indenture	04-29-85	85-191020	---
10-01-85	Indenture	11-07-85	85-531419	---
02-01-87	Indenture	03-11-87	87-146917	---
07-01-87	Indenture	07-27-87	87-474217	---
06-01-92	Indenture	06-25-92	92-0344844	---
04-01-93	Indenture	04-22-93	93-0240063	---
04-01-94	Trust Indenture	04-05-94	94-0273541	---
05-01-95	Indenture	05-16-95	95-0278651	---
11-01-95	Indenture	11-21-95	95-0716354	---
06-01-96	Trust Indenture	07-16-96	96-0498817	---
11-01-98	Trust Indenture	---	---	---
10-01-01	Trust Indenture	05-30-02	2002-0553211	---
07-1-01	Trust Indenture	---	---	---
05-1-04	Trust Indenture			

**Section 17.3 Previous Bonds.** Bonds issued and outstanding by the MPC pursuant to the aforesaid indentures, the original amounts and their final maturity or prior redemption dates, are as follows:

<u>Original Amounts</u>	<u>Title</u>	<u>Final Maturity Or Prior Redemption Date</u>
\$7,130,000	1974 Bonds	07-01-96
17,825,000	1985 Bonds	07-01-93
21,090,000	1985-B Bonds	07-01-93
3,100,000	1987 Bonds	07-01-01
41,205,000	1987 Refunding Bonds	07-01-97
47,095,000	1992 Refunding Bonds	11-01-06
29,475,000	1993 Refunding Bonds	07-01-05
9,295,000	1994 Refunding Bonds	07-01-04
2,950,000	1995 Taxable Bonds	07-01-15
3,500,000	1995 Bonds	07-01-04
7,550,000	1996 Bonds	07-01-04
9,150,000	1998 Bonds	07-01-08
10,500,000	2001 Bonds	07-01-08
30,570,000	2002 Forward Refunding Bonds	07-01-14
75,000,000	2004 Bonds	07-01-24

## ARTICLE XVIII GENERAL

**Section 18.1 Notices; Mailing Addresses.** All notices, consents or other communications required or permitted hereunder shall be deemed sufficient if given in writing addressed and mailed by registered mail, or delivered to the party for which the same is intended, as follows:

To the MPC:	City of Scottsdale Municipal Property Corporation c/o City Clerk 3939 North Drinkwater Boulevard Scottsdale, Arizona 85251
To the City:	City of Scottsdale c/o City Clerk 3939 North Drinkwater Boulevard Scottsdale, Arizona 85251
To Trustee:	Wells Fargo Bank, N.A. 100 W. Washington 7th Floor, MA 4101-077 Phoenix, Arizona 85003

or to such other address as such party may hereafter designate by notice in writing addressed and mailed or delivered to the other party hereto.

**Section 18.2 Written Instrument Required.** Neither this Agreement nor any provision hereof may be changed, waived, discharged or terminated orally, but only by an instrument in writing signed by the party against which the enforcement of the change, waiver, discharge or termination is sought, and if such party is the MPC, then while any Bond indebtedness is outstanding and unpaid, such instrument shall also be signed by the Trustee. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

**Section 18.3 Headings are References Only.** The headings in this Agreement are inserted for reference only, and shall not define or limit the provisions hereof.

**Section 18.4 Execution in Counterparts.** This Agreement may be executed in several counterparts, each of which shall be an original, but all of which shall constitute but one instrument.

**Section 18.5 Provisions are Severable.** In the event any clause or provision of this Agreement shall be held to be invalid by any court of competent jurisdiction, the invalidity of any such clause or provision shall not affect any of the remaining provisions hereof.

**Section 18.6 Applicable Law.** This Agreement shall be governed exclusively by the provisions hereof and by the applicable laws of the State of Arizona. The venue for any proceedings relating to a controversy arising from the subject matter of this Depository Trust Agreement will be the State courts located in Maricopa County, Arizona. The venue for any proceeding relating to a controversy arising from the subject matter of this Agreement will be the State courts located in Maricopa County, Arizona.

**Section 18.7 Cancellation of Contracts.** As required by the provisions of Arizona Revised Statutes Section 38-511, as amended, notice is hereby given that the State of Arizona, its political subdivisions or any department or agency of either, may cancel any contract, without penalty or further obligation, made by the State of Arizona, its political subdivisions or any departments or agencies of either if any person significantly involved in initiating, negotiating, securing, drafting or creating the contract on behalf of the State of Arizona, its political subdivisions or any departments or agencies of either is, at any time while the contract or any extension of the contract is in effect, an employee of any other party to the contract in any capacity or a consultant to any other party of the contract with respect to the subject matter of the contract. The cancellation shall be effective when written notice from the City Council is received by all other parties to the contract unless the notice specifies a later time.

IN WITNESS WHEREOF, the CITY OF SCOTTSDALE MUNICIPAL PROPERTY CORPORATION has executed this Agreement by causing its name to be hereto subscribed by its President and the CITY OF SCOTTSDALE has executed this Agreement by causing its name to be hereunto subscribed by its Mayor and attested by its Clerk, all being done as of the day and year first above written.

CITY OF SCOTTSDALE, MUNICIPAL  
PROPERTY CORPORATION

\_\_\_\_\_  
By:  
Its:

CITY OF SCOTTSDALE

\_\_\_\_\_  
By: Mary Manross  
Its: Mayor

ATTEST:

\_\_\_\_\_  
City Clerk

APPROVED AS TO FORM:

SNELL & WILMER L.L.P.

By: \_\_\_\_\_

State of Arizona       )  
                                  ) ss.  
County of Maricopa    )

Acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2004, by \_\_\_\_\_,  
the \_\_\_\_\_ of the CITY OF SCOTTSDALE MUNICIPAL PROPERTY CORPORATION, an  
Arizona nonprofit corporation, on behalf of the corporation.

\_\_\_\_\_  
Notary Public

My commission expires:

State of Arizona       )  
                                  ) ss.  
County of Maricopa    )

Acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2004, by Mary Manross,  
Mayor of the CITY OF SCOTTSDALE, ARIZONA, an Arizona municipal corporation, on behalf  
of the municipality.

\_\_\_\_\_  
Notary Public

My commission expires: